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agency heads may establish a more appropriate small business definition for the exclusive use in such programs, but only when:

(1) The size standard will determine:

(i) The size of a manufacturing concern by its average number of employees based on the preceding twelve calendar months, determined according to § 121.106;

(ii) The size of a services concern by its average annual receipts over a period of at least three years, determined according to § 121.104;

(iii) The size of other concerns on data over a period of at least three years; or,

(iv) Other factors approved by SBA;

(2) The agency has consulted in writing with SBA's Division Chief, office of Size Standards at least fourteen (14) calendar days before publishing the proposed rule which is part of the rule-making process. The written consultation will include:

(i) What size standard the agency contemplates using;

(ii) To what agency program it will apply;

(iii) How the agency arrived at this particular size standard for this program; and,

(iv) Why SBA's existing size standards do not satisfy the program requirements;

(3) The agency proposes the size standard for public comment pursuant to the Administrative Procedure Act, 5 U.S.C. 553;

(4) The agency provides a copy of the proposed rule, when it publishes it for public comment as part of the rule-making process, to SBA's Division Chief, Office of Size Standards; and

(5) SBA's Administrator approves the size standard before the agency adopts a final rule or otherwise prescribes the size standard for its use. The agency's request for the SBA Administrator's approval must include:

(i) Copies of all comments on the proposed size standard received in response to the proposed rule;

(ii) A separate written justification for the intended size standard;

(iii) A copy of the intended final rule if available at that time, or a copy of the intended final rule and preamble prior to its publication; and

(iv) Other information SBA may request in connection with the request.

(b) When approving any size standard established pursuant to this section, SBA's Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries, and consider other relevant factors.

(c) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to section 601(3) of the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

[67 FR 13716, Mar. 26, 2002]

§ 121.904 When does SBA determine the size status of a business concern?

For compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

[67 FR 13716, Mar. 26, 2002]

PROCEDURES FOR SIZE PROTESTS AND REQUESTS FOR FORMAL SIZE DETERMINATIONS

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a

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parent company or affiliates, or the Director, Office of Government Contracting; and

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For competitive 8(a) contracts, the following entities may protest:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer; or

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for Business Development.

(3) For SBA's Subcontracting Program, the following entities may protest:

(i) The prime contractor;

(ii) The contracting officer;

(iii) Other potential subcontractors;

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and

(v) Other interested parties.

(4) For SBA's Small Business Innovation Research (SBIR) Program, the following entities may protest:

(i) A prospective offeror;

(ii) The funding agreement officer;

(iii) The responsible SBA Government Contracting Area Director or the Division Chief, Office of Technology; and

(iv) Other interested parties.

(5) For the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program of another Federal agency, the following entities may file a protest in connection with a particular SDB procurement:

(i) Any offeror for the specific SDB requirement whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer; and

(iii) The responsible SBA Area Director for Government Contracting, the SBA Director, Office of Government Contracting, or the SBA Associate Administrator for Business Development;

(6) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:

(i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size;

(ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC;

(iii) The contracting officer; and

(iv) The SBA Director, Office of HUBZone, or designee.

(7) For any unrestricted Government procurement in which a business concern has represented itself as a small business concern, the following entities may protest in connection with a particular procurement:

(i) Any offeror;

(ii) The contracting officer; and

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, or the Associate Administrator for Business Development.

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

(i) Any concern that submits an offer for a specific service-disabled veteran-owned small business set-aside contract;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director, Office of Government Contracting, or designee.

(9) For SBA's WOSB Federal Contracting Assistance Procedures, the following entities may protest:

(i) Any concern that submits an offer for a specific requirement set aside for WOSBs or WOSBs owned by one or

more women who are economically disadvantaged (EDWOSB) pursuant to part 127;

- (ii) The contracting officer;
- (iii) The SBA Government Contracting Area Director; and
- (iv) The Director for Government Contracting, or designee.

(b) *Request for Size Determinations.* (1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

- (i) The applicant for assistance; and
- (ii) The SBA official with authority to take final action on the assistance requested. That official may also request the appropriate Government Contracting Area Office to determine whether affiliation exists between an applicant for financial assistance and one or more other entities for purposes of determining whether the applicant would exceed the loan limit amount imposed by §120.151 of this chapter.
- (iii) The SBA Associate Administrator for Investment or designee may request a formal size determination for any purpose relating to the SBIC program (*see* part 107 of this chapter) or the NMVC program (*see* part 108 of this chapter). A formal size determination includes a request to determine whether or not affiliation exists between two or more entities for any purpose relating to the SBIC program.

(2) For SBA's 8(a) BD program:

(i) Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) The 8(a) BD applicant concern or Participant; or

(B) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development.

(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(B) The SBA program official with authority to execute the 8(a) contract or, where applicable, the procuring activity contracting officer who has been delegated SBA's 8(a) contract execution functions; or

(C) The SBA District Director in the district office that services the Participant, or the Associate Administrator for Business Development.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a COC; and

(ii) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and

(ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

(i) The applicant for the reduced patent fees; and

(ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

(7) In connection with initial or continued eligibility for the Small Disadvantaged Business (SDB) program, the following may request a formal size determination:

(i) The applicant or SDB concern; or

(ii) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development.

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or qualified HUBZone business concern; or

(ii) The Director, Office of HUBZone, or designee.

(9) For purposes of validating that firms listed in the Central Contractor

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Registration database are small, the Government Contracting Area Director or the Director, Office of Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will initiate the process to remove from the database the small business designation of any firm found to be other than small.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31907, June 11, 1998; 63 FR 35739, June 30, 1998; 69 FR 25266, May 5, 2004; 69 FR 29206, May 21, 2004; 69 FR 29420, May 24, 2004; 69 FR 44461, July 26, 2004; 73 FR 56947, Oct. 1, 2008; 74 FR 45753, Sept. 4, 2009]

§ 121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

§ 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA*—(1) *Non-negotiated procurement or sale*. A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement*. A protest must be received by the contracting officer prior to the close of business on

the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.

(3) *Long-term contracts*. For contracts with durations greater than five years (including options), including all existing long-term contracts, Multiple Award Schedule (MAS) Contracts, Multiple Agency Contracts (MACs), and Government-wide Acquisition Contracts (GWACs):

(i) Protests regarding size certifications made for contracts must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(ii) Protests regarding size certifications made for an option period must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the size certification made by the protested concern.

(A) A contracting officer is not required to terminate a contract where a concern is found to be other than small pursuant to a size protest concerning a size certification made for an option period.

(B) [Reserved]

(iii) Protests relating to size certifications made in response to a contracting officer's request for size certifications in connection with an individual order must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(4) *Electronic notification of award*. Where notification of award is made electronically, such as posting on the Internet under Simplified Acquisition Procedures, a protest must be received by the contracting officer before close of business on the fifth day, exclusive